



VIA FOIA ONLINE

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U.S. Environmental Protection Agency
Region 4 Freedom of Information
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FREEDOM OF INFORMATION ACT REQUEST

The Center for Biological Diversity (“the Center”) is a non-profit, public interest, conservation organization whose mission is to conserve imperiled native species and their threatened habitat and to fulfill the continuing educational goals of its membership and the general public in the process. The Center’s Oceans Program is dedicated to the conservation of marine species and the marine environment.

Consistent with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, I respectfully request the following information on behalf of the Center:

- 1. All documents and communications that pertain to offshore hydraulic fracturing, fracking, in the Gulf of Mexico. This should include, but is not limited to, all information relied upon by and evaluation by EPA of offshore discharges of fracking chemicals.**
- 2. A list of the annual volume of produced water discharged (or anticipated) for each facility and the name of each facility that has submitted a notice of intent to use**
 - General Permit No. GMG290000 For Offshore Oil and Gas Activities in the Western Portion of the Outer Continental Shelf of the Gulf of Mexico (Region 6); and**
 - General Permit No. GEG460000 For Offshore Oil and Gas Activities in the Eastern Gulf of Mexico (Region 4).**
- 3. All discharge monitoring reports that include any reports of produced water toxicity testing that exceeded toxicity limits for facilities using General Permits GMG290000 and GEG460000 between January 1, 2013 to present.**

“All documents and communications” includes, but is not limited to, paper or electronic copies of all preliminary and final reports, memoranda, schedules, maps, studies, data, correspondence, comments, files, letters, conversation records, notes, email messages (and attachments), phone logs, and “chat.” This should include all documents and communications the agency has taken part in, shared, or received internally, with other agencies, or with other private and public entities.

In the event that access to any of the requested records is denied, please note that FOIA provides that any “reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under [FOIA].” 5 U.S.C. § 552(b). Please provide all non-exempt portions of the requested records that are reasonably segregable, describe the deleted material in detail, and specify the statutory basis for the denial, as well as your reasons for believing that the alleged statutory justification applies in each instance. Please separately state your reasons for not invoking your discretionary power to release the requested documents in the public interest.

This request is being sent to the Region 6 and Region 4 with the understanding that it will be forwarded to any other offices that contain the requested information.

REQUEST FOR FEE WAIVER

The Center requests that you waive all fees in connection with this matter. As shown below, the Center meets the two-pronged test under FOIA for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by the EPA’s fee waiver regulations at 40 C.F.R. § 2.107. In particular, the Center has demonstrated that the disclosure of this information will significantly contribute to public understanding of the operations or activities of the government.

In considering whether the Center meets the fee-waiver criteria, it is imperative that the EPA remember that FOIA carries a presumption of disclosure and that the fee-waiver amendments of 1986 were designed specifically to allow non-profit, public interest groups such as the Center access to government documents without the payment of fees. As stated by one Senator, “[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . .” 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the Ninth Circuit has stated that the amended statute “is to be liberally construed in favor of waivers for noncommercial requesters.” McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). The Ninth Circuit has also explicitly pointed out that the amendment’s main purpose was “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.” Id. Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by “watchdog” organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As the District of Columbia Circuit Court has stated, this waiver provision was added to FOIA “*in an attempt to prevent government agencies*

from using high fees to discourage certain types of requesters and requests,” in clear reference to requests from journalists, scholars, and, most importantly for our purposes, non-profit public interest groups. Better Gov’t Ass’n v. Department of State, 780 F.2d 86, 93-94 (D.C. Cir. 1986), quoting Ettlinger v. FBI, 596 F. Supp. 867, 876 (D. Mass. 1984) (emphasis added).

I. The subject of the requested records concerns “the operations or activities of the government.”

The subject matter of this FOIA request relates to the government’s regulation and protection of marine water quality and aquatic life. It also relates to the EPA’s implementation of the Clean Water Act. It is clear that such action is a specific and identifiable activity of the government, in this case the executive branch agency the EPA. See Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1313 (D.C. Cir. 2003) (“‘[R]easonable specificity’ is ‘all that FOIA requires’ with regard to this factor.”) (internal quotations omitted).

II. The disclosure is “likely to contribute” to an understanding of government operations or activities (the informative value of the information to be disclosed).

The requested documents will provide important information regarding how the EPA is regulating ocean water quality, protecting marine resources, and the environment. It will demonstrate how EPA is carrying out duties under the Clean Water Act. It provides information concerning how the EPA is implementing environmental laws and managing water quality in the Gulf of Mexico. Such knowledge will allow better understanding of government operations, in particular, what EPA has permitted with respect to produced water discharges in the Gulf of Mexico from offshore oil and gas platforms.

III. The disclosure of the requested information will contribute to “public understanding.”

The information requested will help provide the Center and the public with better understanding of EPA’s regulation of ocean discharges, including efforts to protect the Gulf of Mexico from toxins that may occur in wastewater from offshore fracking. The information will inform the public about EPA’s efforts maintain marine water quality and to protect beaches, coasts, and marine waters from pollution. The information will provide the public with more information about regulation of pollution from offshore oil and gas platforms. These documents are not currently in the public domain. Their release is not only “likely to contribute,” but is in fact certain to contribute to better public understanding of EPA obligations to promulgate new science-based regulations on ocean pollution. The public is always well served when it knows how government activities, particularly matters touching on legal and ethical questions, have been conducted. See Judicial Watch, 326 F.3d at 1314.

In McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1286, the court made clear that “[FOIA] legislative history suggests that information [has more potential to contribute to

public understanding] to the degree that the information is new and supports public oversight of agency operations....” In this instance, all the requested documents potentially provide new information about steps that could protect marine waters from toxic fracking chemicals, and how the EPA is, or is not, implementing such measures.

IV. The disclosure is likely to contribute significantly to public understanding of government operations or activities.

Public oversight and enhanced understanding of marine pollution, ocean discharge criteria, and what EPA is doing about oil and gas wastewater it is absolutely necessary. The Center’s track record of active participation in oversight of governmental agency activities and the Center’s consistent contribution to the public’s understanding of agency activities are well established. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a *reasonably broad audience of persons interested in the subject*. Carney v U.S. Dept. of Justice, 19 F.3d 807 (2nd Cir. 1994)(emphasis added).

The requested information is certain to shed light on the strength of existing measures to protect marine waters from pollution, as well as whether or not the EPA is acting properly in light of those impacts, and whether the EPA is complying with applicable law. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. The Center intends to fulfill its well established function of public oversight of agency action. The Center is not requesting these documents merely for their intrinsic informational value.

Concurrent with any action which the Center may take after obtaining the requested documents, the Center will publicize the reasons for the action and the underlying actions of the EPA and/or other agencies that have prompted the action. This is certain to result in a significant increase in public understanding of government agency activity, and in particular of EPA compliance with applicable laws. The Center has enforced or publicized agency compliance with the provisions of various laws and regulations many times through information gained from FOIA requests like this one. The Center intends to use the documents requested here in a similar manner.

The Center’s informational publications supply information not only to its membership, but also to the memberships of most other conservation organizations, locally as well as nationally. Our informational publications continue to contribute information to public media outlets, as well. For example, information such as that presently requested is often disseminated through our e-mail Biodiversity alerts, which are sent thousands of people approximately once a week, and our web page, which is accessed several hundred-thousand times each month. Information concerning the EPA’s protection of marine ecosystems from pollution will likely be disseminated through all of these means. See Forest Guardians v. DOI, 416 F.3d 1173, 1180 (10th Cir. 2005) (“Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are

meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public's understanding of the BLM's operations and activities.”).

V. Obtaining the information is of no commercial interest to the Center.

Access to government documents and similar materials through FOIA requests is essential to the Center’s role of educating the general public. The Center, a non-profit, has no commercial interest and will realize no commercial benefit from the release of the requested information.

I hope that this letter has demonstrated to your satisfaction that the Center qualifies for a full fee-waiver, and that you will immediately begin to search and copy the requested material. Please contact me if you have any further questions. Thank you.

Sincerely,

/s/ Miyoko Sakashita

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